
(2011) 10 KAR CK 0073
In the Karnataka High Court
Case No : ITA No's. 131-132 of 2011

Srinidhi Gold

APPELLANT

Vs

ITO

RESPONDENT

Date of Decision : 17-10-2011

Acts Referred:

Income Tax Act, 1961 — Section 143 (2), 253 (1) (2), 254 (2), 256, 260 A

Citation : (2012) 210 TAXMAN 120

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : A. Shankar, for the Appellant; E. Sanmathi Indrakumar, for the Respondent

Final Decision : Allowed

Judgement

N. Kumar J.

1. The assessee has preferred these two appeals arising out of the appeals which were the subject matter before the Tribunal. As a common question of law is involved in these appeals they are taken up for consideration together and disposed off by this common order. The assessee is a partnership firm engaged in the business of purchase and sale of jewellery both gold and silver. The assessee filed its return of income for the assessment year 2006-07 declaring the income as Nil on 10-7-2007. The said return was selected for scrutiny. A notice u/s 143(2) of the Income Tax Act, 1961 (for short hereinafter referred to as the Act) came to be issued. On receipt of the same the assessee filed the details called for from time to time. The assessing officer processed the return of income of the assessee and computed the total income of the assessee by his order dated 31-12-2008 as per Annexure-C. The total taxable income was arrived at Rs. 42,58,767. Aggrieved by the said assessment order the assessee preferred an appeal to the Commissioner of income tax (Appeals), Mysore. The appellate Commissioner partly allowed the appeal by his order dated 13-3-2009 as per annexure-E. Aggrieved by the order of the appellate Commissioner to the extent

held against the assessee, a second appeal was preferred to the appellate Tribunal by the assessee. The Tribunal after hearing both the parties allowed the appeal of the assessee in part by the order dated 24-9-2009. The revenue filed a Miscellaneous Petition u/s 254(2) of the Act for recalling the order pointing out certain irregularities in the order passed by the Tribunal. The assessee also filed a Miscellaneous application for rectification of certain mistakes in the order passed by the Tribunal. The Tribunal after hearing both the applications together allowed the Miscellaneous application filed by the revenue recalling the order dated 24-9-2009 in its entirety and consequently it dismissed the Miscellaneous application filed by the assessee on the ground that the assessee can agitate his contentions at the time of rehearing of the appeal. Aggrieved by these two orders the assessee has preferred these appeals.

2. Sri A Shankar, the learned counsel appearing for the assessee contended that u/s 254(2) of the Act a power is vested with the Tribunal which has passed a final order to and the orders so as to rectify the errors which are borne from the face of the record. It has no power to review the entire order and re-hear the appeal afresh. Therefore, he submits that the Tribunal exceeded in its jurisdiction in recalling the entire order and posting the appeal for re-hearing.

3. Per contra, the learned senior counsel Sri Indra Kumar, appearing for the department supported the impugned order.

4. The substantial question of law which arises for consideration in this appeal is whether the Tribunal can recall an order passed u/s 254(1) of the Act, on an application filed by either of the party under" section 254(2) of the Act? In order to answer this contention it is necessary to examine the provision. Section 254 reads as under :

254 (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

[1A] (***)

(2) The appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under subsection (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the assessing officer:

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee shall not be made under this subsection unless the appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard:

[Provided further that any application filed by the assessee in this sub-section on or after the 1-10-1998, shall be accompanied by a fee of fifty rupees.]

[(2A) In every appeal, the appellate Tribunal, where it is possible, may hear and

decide such appeal within a period of four years from the end of the financial year in which such appeal is filed under sub-section (1) of sub-section (2) of section 253 :

Provided that the appellate Tribunal may, after considering the merits of the application made by the assessee, pass an order of stay in any proceedings relating to an appeal filed under sub-section (1) of section 253, for a period not exceeding one hundred and eight days from the date of such order and the appellate Tribunal shall dispose of the appeal within the said period of stay specified in that order :

Provided further that where such appeal is not so disposed of within the said period of stay as specified in the order of stay, the appellate Tribunal may, on an application made in this behalf by the assessee and on being satisfied that the delay in disposing of the appeal is not attributable to the assessee, extend the period of stay, or pass an order of stay for a further period or periods as it thinks fit; so, however, that the aggregate of the period originally allowed and the period or periods so extended or allowed shall not, in any case, exceed three hundred and sixty-five days and the Appellate Tribunal shall dispose of the appeal within the period or periods of stay so extended or allowed.

[Provided also that if such appeal is not so disposed of within the period allowed under the first proviso or the period or periods extended or allowed under the second proviso, which shall not, in any case, exceed three hundred and sixty-five days, the order of stay shall stand vacated after the expiry of such period or periods, even if the delay in disposing of the appeal is not attributable to the assessee]

(2B) The cost of any appeal to the appellate to the appellate Tribunal shall be at the discretion of that Tribunal]

(3) The Appellate Tribunal shall send a copy of any orders passed under this section to the assessee and to the [(**) Commissioner].

(4) Save as provided in section 256 (or section 260A), orders passed by the appellate Tribunal on appeal shall be final.

A perusal of the aforesaid provision makes it very clear that the appellate Tribunal after hearing both the parties can pass such orders thereof as it thinks fit. In other words, it can pass an order disposing off the appeal before it finally in the manner as it thinks fit. Sub-section (2) provides for rectification of any mistake apparent from the record. In the orders passed u/s 254 (1), if either of the party to the order u/s 254(1) makes an application for such rectification of mistakes apparent from the record, the Tribunal is vested with the power to amend the order passed under sub-section (1), if it is satisfied that there is a mistake in the order which it has passed u/s 254(1). The only limitation imposed on the Tribunal is that the mistake to be rectified is a mistake borne from the record. Then it gets jurisdiction to amend such orders. The concept of amending

any order is well understood in legal parlance. By way of an amendment the court which passed the order rectifies the mistakes, in other words, it modifies its earlier order by removing that mistake which exists in the original order. The only difference is that the mistake which was there in the earlier order is not found in the subsequent order passed where those mistakes are rectified and the earlier order stands amended. By no stretch of imagination the said power could be exercised to review the earlier order passed. The only power that is conferred u/s 254(2) is to amend the order passed u/s 254(1) so as to rectify the mistake which is apparent from the record. Infact, the view which we have taken is also supported from the judgment of the Delhi High Court in the case of Karan and Co. Vs. ITAT, where it is held as under :

The scope and ambit of application of section 254(2) is very limited. The same is restricted to rectification of mistakes apparent from the record. We shall first deal with the question of the power of the Tribunal to recall an order in its entirety. Recalling the entire order obviously would mean passing of a fresh order. That does not appear to be the legislative intent. The order passed by the Tribunal u/s 254(1) is the effective order so far as the appeal is concerned. Any order passed u/s 254(2) either allowing the amendment or refusing to amend gets merged with the original order passed. The order as amended or remaining unamended is the effective order for all practical purposes. The same continues to be an order u/s 254(1). That is the final order in the appeal. An order u/s 254(2) does not have existence de hors the order u/s 254(1). Recalling of the order is not permissible u/s 254(2). Recalling of an order automatically necessitates rehearing and readjudication of the entire subject matter of appeal. The dispute no longer remains restricted to any mistake sought to be rectified. Power to recall an order is prescribed in terms of rule 24 of the income tax (Appellate Tribunal) Rules, 1963 and that too only in cases where the assessee shows that it had a reasonable cause for being absent at a time when the appeal was taken up and was decided ex parte. This position was highlighted by one of us (Justice Arijit Pasayat, Chief Justice) in Commissioner of Income Tax and Another Vs. Income Tax Appellate Tribunal and Another, Judged in the above background the order passed by the Tribunal is indefensible.

Infact, following the aforesaid judgment, this Court in the case of Assistant Commissioner of Income Tax Vs. C.N. Ananthram, at the instance of the revenue set aside the order passed by the Tribunal which had reviewed the order on an application filed for amendment of the order. In that view of the matter, the impugned order passed by the Tribunal cannot be sustained. Hence, we pass the following order :

Both the appeals are allowed. Both the impugned orders are set aside. The substantial questions of law is answered in favour of the assessee and against the revenue. However, the Tribunal shall consider the applications filed both by the revenue as well as the assessee for rectification of the mistake in the order and then to pass appropriate order either amending the earlier order or refusing

to amend the order as it thinks fit.